RECENT AMERICAN DECISIONS.

Supreme Court of New Jersey.

JAMES A. WRIGHT ET. AL. *v.* EMMA M. REMINGTON.

The statute of the state of Illinois which provides that "contracts may be made and liabilities incurred by a wife, and the same enforced against her to the same extent and in the same manner as if she were unmarried," empowers a married woman in that state to sign a note as surety for her husband.

Such a contract is not so in conflict with the general interest of the body of the citizens of New Jersey, or its public policy, as to afford a reason for a non-enforcement of the contract in that state.

A threat made by a husband through procurement of one of the payees of a note executed by the husband that unless his wife signed such note he would poison himself, and which threat was made to induce, and did induce her to sign, does not amount to duress, and is, in law, no defence to an action against her upon such note.

Parol declarations made by the payee of a note to the maker, endorser or guarantor thereof, at the time of the signing, to the effect that such maker, endorser or guarantor would not be called upon to pay the note, are not admissible in evidence, and are therefore no defence to an action upon such note.

THE statement of the case shows that this cause involved the trial of two feigned issues framed to try the validity of two judgments entered upon notes, with warrant to confess judgment against Emma M. Remington. The said notes were signed by Emma M., and her husband, S. Remington, at Chicago, and were payable at the same place. They were made payable to the order of Kent & Keith, and were endorsed by them to the plaintiff after maturity. It appeared on the trial that Emma M. signed these notes as surety for her husband, S. Remington. To meet this the plaintiff offered in evidence the public laws of 1861, of 1869, and the Revised Statutes of the year 1874, of the state of Illinois. Each contained acts relative to married women, the most important entitled "An act to revise the law in relation to husband and wife." Rev. (Ill.) p. 576.

When the plaintiffs rested, a motion to nonsuit was made, on the ground that the laws of Illinois were not sufficiently proved, and that it was not shown that there was no such law in Illinois as the fifth section of the New Jersey Married Woman's Act. This motion was refused.

On the part of the defendant it was shown that, at the time of making the notes, Emma had been separated from her husband two or three months. It was proved that the husband, to induce his wife to sign, threatened self-destruction by taking poison unless she

signed them. It was in evidence that Kent, one of the payees, and his lawyer, Rockwell, solicited Mrs. Remington to sign the notes. She swore that Kent said to her that she would not be obliged to pay the notes. And that he said to her that "all he wanted was my name as security; he would let Mr. Remington pay them afterward; Mr. Rockwell said that if he were I he would sign the notes; I would not be obliged to pay them; Mr. Remington would pay them by work."

The charge to the jury was as follows:

"Another ground of defence is, that these notes were signed by her in consequence of threats, made by the husband, of self-destruction unless she executed them, and that, having been signed under that compulsion, she insists that she is not liable. This ground of defence resolves itself into two questions:

"First. If the threats were made by the procurement of Kent & Keith, or their agent, Rockwell, to bring about the execution of the notes, and if they were operative in getting her signature to the notes, it would amount to a legal defence to this action.

"Second. If the threats were made without the knowledge of Kent & Keith, or their agent, and were of such a character and made under such circumstances as might reasonably be expected to take from the defendant the power of choosing whether she would sign the notes or not, and she did, in fact, sign them in that state of mind, and would not have signed them at all but for such threats, you may, for the purposes of this case, consider that she cannot be held liable for the payment of the notes. The burden of showing this is upon Mrs. Remington."

In charging the jury about the third ground of defence, the court said: "There is another ground of defence, viz., that at the time of the execution of the notes, it was represented to Mrs. Remington, by Kent & Keith and their agent, Mr. Rockwell, that the signing was a mere matter of form, and she would not be held liable. If you believe that these representations were made, and that the defendant signed the notes on the faith of them, this is a good defence."

A verdict was returned for the defendant, Emma.

The cause was certified by the trial judge to this court for the advisory opinion of this court upon a motion for a new trial.

H. A. Drake, for the plaintiff.

R. S. Jenkins, for the defendant.

The opinion of the court was delivered by

REED, J.—The admission of the statutes of Illinois was entirely proper under the provisions of section 22 of our Evidence Act: Rev., p. 381. The last statute offered was relied upon by the plaintiffs to show the validity of the contract of married women in Illinois, the place of the making and performing the same. The 6th section of the said act—Rev. (Ill.) 1874, p. 576—is as follows: "Contracts may be made and liabilities incurred by a wife, and the same enforced against her to the same extent and in the same manner as if she were unmarried, but, except with the consent of her husband, she may not enter into or carry on any partnership business, unless her husband has abandoned or deserted her, or is an idiot, or insane, or is confined in the penitentiary."

The proviso contained in the 5th section of our Married Woman's Act is absent from the Illinois statute, and there appears in the latter no restriction upon the contractual ability of the married woman to become endorser, surety or guarantor. Subject to the exceptional instances of her engaging in partnership business, she is as unrestricted as a *feme sole*. There can, therefore, be no question but that the contract was valid by the law of Illinois.

It is, therefore, the duty of the courts of this state to recognise and enforce it, unless it appears injurious to the interests of the state or of our citizens. But nothing approaching this result can be deduced solely from the fact that the foreign statute confers upon a married woman the power to make a contract of suretyship.

That it would have been an act of legislative wisdom to have incorporated into the Illinois act a provision similar to that in our own and the New York state Married Woman's Act, by which the married woman is restrained from assuming a liability as surety, I think the testimony in this case demonstrates. But whatever may be our opinion of the policy of legislation beyond our state, we are bound by the principles of comity to recognise its validity, unless it clearly contravenes the principles of public morality or attacks the interest of the body of the citizens of our state. This does neither, and there is no force in the objection taken upon this ground.

The next ground of contention by the defence at the trial was relative to the effect of the acts of the husband, and also of one of

the payees and his attorney toward the married woman before and at the time of signing these notes.

The court charged the jury, substantially, that if threats were made by the husband, through the procurement of the payees or their agent, that he (the husband) would kill himself unless she signed, and the threats were made for the purpose of inducing, and did induce, her to sign the notes, then the woman was not liable upon the notes. The court also charged that even if the threats were made without the knowledge of the payees, and were of such a character as to deprive her of the power to choose whether she would or would not sign, &c., then she was not liable. Both of the above instructions were given obviously upon the assumption that the facts upon the existence of which they were predicated, showed such a coercion of the will of the woman as to deprive her of the power of volition, and so the contract was stripped of an essential element, namely, the assent of both parties to its terms.

The common law, however, very early guarded the stability of contracts by a rule which required the exercise of a much higher degree of coercive force than here appears, before the question of want of the power of consent could be entertained as a question of fact. The degree of restraint or terror to which the party must be subjected, as a ground for avoiding his contract, must rise to what the law recognised as duress, and the statement of the grounds of such avoidance appears in the earliest books of authority: Bac. Abr., "Duress."

These grounds were stated in the case of *Sooy, ads.*, v. *State*, 9 Vroom 329, and a repetition of them here would be profitless. The language in the opinion in that case, although used in reference to the avoidance of a bond, is applicable to the avoidance of any contract, sealed or unsealed.

In turning from the statement of what is essential to constitute a defence upon the ground of duress, to the facts in this case, it at once appears that they do not make a case within the rule laid down relative to such defence. There was no imprisonment of the woman or threat of imprisonment. There was no threatened injury to her person.

The influence was, that her husband threatened, not to injure her, but to kill himself. It is true that there is the statement in the books that duress to a wife will avoid a deed made by the hus-

band under that influence. Bac. Abr., "Duress," B. It may be that had the payees of the note or their agent, threatened to take the life of the husband, unless the wife signed the note, and she signed under the influence of the terror excited by such threats, it would have avoided the contract. But here the threats were made by the husband against his own life. The maker and the object of the threats were the same. Their execution was within his own power of volition. The wife knew that no harm could come to him except by his own act. The present case is utterly unlike an instance of the presence of some overshadowing danger, uncontrollable by either the wife or the person endangered.

There is no trace of a doctrine that the threat of a husband against himself will avoid the contract of his wife, or conversely, and such a rule would lead to an instability in that class of contracts which would be vicious.

I am unable to perceive that any duress, in the sense in which the law has heretofore regarded it, exists in this case, either to the husband or through him to the wife.

It is true that the privilege which the law, in many states, has conferred upon the married woman to contract with and for the benefit of any one, including her husband, raises novel questions.

And where the contract is for the husband's benefit in those states where that is possible, the method by which the wife was induced to enter into the contract, will probably afford frequent occasions for judicial supervision. But to break down the rules of the common law in treating of the validity of the contract of any person whom the legislature has seen fit to invest with an unfettered contracting ability, would lead to confusion and uncertainty.

The avoidance of contracts upon the ground of undue influence, where, although there is no duress, one of the parties has taken advantage of the situation of the other, is a matter of purely equitable cognisance, and can receive no recognition in a court of law.[1] 1 Chit. on Con. 273; 1 Story's Eq. Jur., § 239.

[1] In *Miller* v. *Miller*, 68 Penn. St. 486, AGNEW, J., said: "Nor is there a duress *per minas* in equity, which does not exist at law: *Stouffer* v. *Latshaw*, 2 Watts 168. The power of mind necessary to give assent to a contract, is the same in law and equity. A chancellor, it is true, will refuse his aid to enforce specific performance of a contract, for a reason less than that constituting duress *per minas*, or will set aside a bargain for extortion or undue influence operating upon a weak mind, or under circumstances of a confidential relation; but equity will not set aside an agreement on the ground of duress *per minas* alone, where the law will refuse to do so."

I think there was no defence upon this part of the case.

The third ground of defence was, that at the time of the execution of the notes, it was represented to Mrs. Remington that the signing was a mere matter of form, and that she would not be held liable. There is no rule better settled than that evidence of contemporaneous parol declarations is inadmissible to vary the terms of a written contract.

In the enforcement of this rule, there is often a strong tendency to disregard its effect induced by a feeling of the inequity of holding a party to the strict performance of an agreement into which he has entered, upon an assurance that it would not be enforced according to its terms. This feeling has led courts sometimes to recognise the parol declaration, upon the ground that it amounted to an equitable estoppel. Notes *to Duchess of Kingston's case*, 3 Smith's Lead. Cas. 729. But the rule of evidence that when the contract is reduced to writing, the writing is the only evidence of the contract, excludes any evidence of the parol declarations.

The rule is recognised as a wholesome doctrine by which men are enabled to place their agreements in a shape undisturbable by the uncertainty of oral testimony. The weight of authority is overwhelming in favor of holding, in the language of the American editors of the *Duchess of Kingston's Case*, that "a person who is so ill-advised as to execute a written contract in reliance upon an assurance that it shall not be literally enforced, must submit to the loss if he is deceived, and cannot ask that a principle of great moment to the community shall be made to yield for the sake of relieving him from the consequences of his indiscretion." See cases cited in note, *supra*.

This rule prevails in equity as well as at law: *Woollam* v. *Hearn*, 2 Lead. Cas. in Eq. (3d ed.) 679.

The rule is applied, in its entire rigor, to notes and bills: 2 Parsons on Notes and Bills 501; *Meyer* v. *Beardsley*, 1 Vroom 236.

The Circuit Court is advised that no legal defence to the notes in question was offered, and that the verdict should be set aside.

It has long been settled that a man may avoid his own act: 1st. For fear of loss of life. 2d. Of loss of member. 3d. Of mayhem, or of great bodily harm; and 4th. Of imprisonment. See Bac. Abr. "Duress," A.; Co. Lit. 253 *b*; *Foss* v. *Hildreth*, 10 Allen 76; *Foshay* v. *Ferguson*, 5 Hill 154; *Bogle* v. *Hammons*, 2 Heisk. 136; *Belote* v. *Henderson*, 5 Cold. 474; *Baker* v. *Mor-*

ton, 12 Wall. 158; *Brown* v. *Pierce*, 7 Wall. 214; *Helm* v. *Helm*, 11 Kan. 19.

At the present time, however, it is doubtful whether the doctrine ought to be confined within such narrow limits, and there seems a growing tendency in the courts of this country to extend the old common-law rule so as to include many cases which formerly would not have been considered duress. As observed by BRONSON, J., in *Foshay* v. *Ferguson*, 5 Hill 158, as civilization has advanced, the law has tended much more strongly than it formerly did to overthrow everything which is built upon violence or fraud. See also *Tapley* v. *Tapley*, 10 Minn. 458, per BERRY, J.; *United States* v. *Huckabee*, 16 Wall. 432, per CLIFFORD, J.; *Waller* v. *Parker*, 5 Cold. 476; *Mann* v. *Lewis*, 3 W. Va. 223; *Mann* v. *McVey*, Id. 238; Ewell's Leading Cases on Disabilities 771, *et seq.*; 1 Pars. on Cont. (5th ed.) 395.

Thus, the old authorities, and some modern, say that menacing to commit a battery, or a mere trespass to lands or goods, is not sufficient to avoid the act, because such a threat ought not to overcome a firm and prudent man, and because the law would afford adequate redress, if actually committed: Bac. Abr. "Duress," A.; Bro. Abr. "Duress," pl. 16; 2 Inst. 483; *Sumner* v. *Ferryman*, 11 Mod. 203, cited in 2 Str. 917; 2 Greenl. Ev., § 301; 1 Chit. on Cont. (11th Am. ed.) 271. But at the present time it is believed that a menace of battery or destruction of property, provided the freedom of the will is overcome and the act procured thereby, would avoid the act: *Foshay* v. *Ferguson*, *supra*; *Tapley* v. *Tapley*, *supra*; *United States* v. *Huckabee*, *supra*; *Waller* v. *Parker*, *supra*; 1 Pars. on Cont. (5th ed.) 395. See also Roll. Abr. 687, pl. 3, 12; s. c. Book of Assizes 20, pl. 14; 9 Vin. Abr. 317, "Duress," B 3; *Loomis* v. *Ruck*, 65 N. Y. 462.

So, the older authorities nearly all maintain that a threat to burn one's house or other property, does not amount to duress. See Bac. Abr., "Duress," A; Perkins, § 18; 1 Bl. Com. 130; *Edwards* v. *Handley*, Hardin 615; *Maisonnaire* v. *Keating*, 2 Gall. 337. See also Metc. on Cont. 25. But the tendency and weight of modern American authority seems to support the contrary position. See *Foshay* v. *Ferguson*, *supra*; *Bingham* v. *Sessions*, 14 Miss. 22; *Walter* v. *Parker*, *supra*; 1 Chit. on Cont. (11 Am. ed.) 272; 1 Story on Cont. (5th ed.) § 516; 1 Pars. on Cont. (6th ed.) 395.

The case of duress of goods, so-called, as laid down in the leading case of *Sasportas* v. *Jennings*, 1 Bay 470; s. c. Ewell's Lead. Cases 782, may be mentioned as another instance of the relaxation under certain circumstances of the strict rule of the common law as to what constitutes duress. Although the doctrine of this case is opposed to that of *Skeate* v. *Beale*, 11 Ad. & Ell. 983, s. c. Ewell's Lead. Cases 775, it may probably be considered as supported by the weight of American authority. See *Collins* v. *Westbury*, 2 Bay 211; *Bingham* v. *Sessions*, 14 Miss. 22; *Nelson* v. *Suddarth*, 1 Hen. & Mun. 350; *Crawford* v. *Cato*, 22 Geo. 594; *Miller* v. *Miller*, 68 Penn. St. 493; *White* v. *Heylman*, 34 Id. 142; *Spaids* v. *Barrett*, 57 Ill. 293; *Bennett* v. *Ford*, 47 Ind. 264; *Modlin* v. *N. W. Turnpike Co.*, 48 Ind. 492. See, however, *Hazelrigg* v. *Donaldson*, 2 Met. (Ky.) 445; *Jones* v. *Bridge*, 2 Sweeny 431; *Burr* v. *Burton*, 18 Ark. 233. In *Miller* v. *Miller*, 68 Penn. St. 486, AGNEW, J., said: "We concur with the counsel of the defendant in error that in civil cases the rule as to duress *per minas* has a broader application at the present day than it formerly had. Where a party has the goods or property of another in his power so as to enable him to exert his control over

it to the prejudice of the other, a threat to use this control may be in the nature of the common-law duress *per minas*, and enable the person threatened with this pernicious control to avoid a bond or note obtained without consideration, by means of such threats. See *White* v. *Heylman*, 10 Casey 142, where the authorities are collected. But mere threats of injury, in regard to property, without a power over it also, to enable the party to execute his threats, are not in themselves duress *per minas*, however otherwise they may enter into questions of fraud or extortion."

So, in *Tapley* v. *Tapley*, 10 Minn. 448, threats by a husband to abandon his wife, which she thought "would be a family scandal" clearly threatening injury to her good name, accompanied by general abusive treatment, were held to be duress, so as to avoid a deed executed by her under a reasonable apprehension that they would be carried into effect.

In 14 Am. Law Reg. N. S. 201, Mr. *W. H. Phillips* has learnedly considered the question as to what amounts to duress *per minas* at law; and, after a review of the old and modern Roman law rules, as well as the leading English and American cases upon the question, he submits the following eminently reasonable propositions:

1. "That *any unlawful threats* amount to duress *per minas*, sufficient to avoid a contract or agreement, if such contract or agreement would not have been entered into, if the threats had not been used."

2. "That the question whether a contract or agreement was entered into through fear, is a question of *fact*, for the jury to decide in each individual case, and that therefore it would be erroneous for a judge to charge *as a principle of law*, that the duress, in order to avoid the obligation, must have been such as was calculated to overcome the will of a man of ordinary firmness of mind."

Tested by the foregoing considerations, the principal case, so far as it touches upon the question of duress, is not satisfactory. If the jury found that the threats, which were operative in procuring the wife's signature, were made by the procurement of the payees of the notes, it would seem clear that their legal effect is the same as if made by the payees themselves. See Cooley on Torts 533, 534. And the fact that the immediate maker and object of the threats were the same, affords, as it seems, no sufficient reason for holding it not to be duress, so long as her freedom of will was overcome thereby, as the jury must have found. It is well settled that the husband may avoid an act done by reason of duress to his wife, and conversely that the wife may avoid an act by reason of duress of her husband: 2 Brownl. 276; Bac. Abr., "Duress," B.; *Plummer* v. *The People*, 16 Ill. 360; *Brooks* v. *Berryhill*, 20 Ind. 97; *Eadie* v. *Slimmon*, 26 N. Y. 9; *Green* v. *Scranage*, 19 Iowa 461. By reason of the legal unity of the husband and wife, it would seem that the legal effect of such a threat, provided it in fact overpowered the wife's will, must be the same as if it were directed towards her own person, and to hold otherwise is a mere sticking in the bark of a legal technicality, the real question being, was there any assent to the contract, was the act of the wife the offspring of her own free will, or to the act of another acting by the procurement of the payees? The argument that such a rule would lead to an instability in that class of contracts which would be vicious, has no weight whatever, where the jury have found as in this case, that the contract was not the act of the wife, but of another, unless it is deemed advisable to give stability to contracts procured by duress and fraud, at the expense of the rights of married women. Duress by a stranger, by procurement of the party that shall have the benefit, is a

good cause to avoid: 43 E. III. 6; Rolle Abr. 688, s. c. Much more should it be good cause to avoid, when the immediate agent is the husband, even though the threat is aimed at his own person and not the wife's.

It is true that it has been said that duress by a stranger without making the obligee party thereto, is no cause to avoid: Keilw. 154 *a*; Bac. Abr., "Duress," B. See also *Tailey* v. *Robinson*, 22 Gratt. 895. But this proposition has with good reason been questioned: 1 Story on Contracts (5th ed.), § 578. See also *Vander Hoven* v. *Nette*, 32 Tex. 184; *Olivari* v. *Menger*, 39 Id. 76. And unless the rights of innocent third parties have intervened which would be prejudiced by the avoidance of the act, it would seem the more reasonable rule to hold that the wan of assent renders the act voidable, even though the party claiming the benefit of the act may not have been privy to the duress. The fact that a note was originally obtained by duress, will not be a good defence to the note in the hands of a *bona fide* holder for a valuable consideration paid before its maturity: *Hogan* v. *Moore*, 48 Geo. 156; *Clarke* v. *Peace*, 41 N. H. 414. But this principle can not affect the decision of this case, for the reason that the notes sued on were indorsed to plaintiffs after maturity.

MARSHALL D. EWELL.

Chicago, June 19, 1878.

Supreme Court Commission of Ohio.

BIRDSALL *v.* HEACOCK.

A letter addressed to a lumber merchant in the following language: "Please send my son the lumber he asks for, and it will be all right," is a guaranty that the lumber sold and delivered to the son, at the time of its presentation, will be paid for.

But such guaranty is not *continuing*, so as to make the guarantor liable for lumber subsequently purchased by the son from the same merchant. And payments afterward made by the principal, on account, will be applied in satisfaction of the first purchase, and consequent discharge of the guarantor's liability.

ERROR to the Court of Common Pleas of Stark county.

The original action was brought by plaintiff in error, in the Court of Common Pleas of Stark county, against one T. C. Heacock, as principal debtor, and the defendant in error, as guarantor, seeking to recover a balance remaining due on an account for lumber sold and delivered by plaintiff's firm to the said T. C. Heacock. The first items of the account bore date May 11th 1868, and were of the value of $226. Then followed sundry items for lumber delivered at different dates, extending down to January 1869, and amounting in the aggregate to $2962. Credits were given for payments, at sundry times, to the amount of $2522. The present defendant demurred, on the ground that the facts